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Nos. 80-1798, 80-1808, and 81-91

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WOELKE & ROMERO FRAMING, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD; CARPENTERS LOCAL NO. 944, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO; and CARPENTERS LOCAL NO. 235, UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA, AFL-CIO,
Respondents,

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent,

OREGON - COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The approximately 120,000 members of the National Association of Home Builders ("NAHB") include representatives of every facet of residential construction, a $150 to $200 billion industry employing 3.5 million people. NAHB members construct 75 percent of all housing in the United States, including traditional single family homes, apartments, multifamily homes and condominiums.

NAHB has followed the progress of these and related cases[1] with great interest, because their outcome will greatly affect the business practices of its members and their choice of methods to achieve economic efficiency in home building.[2]

The membership of NAHB includes builders and subcontractors who employ both union and non-union labor. Both are critically affected by "union-signatory" subcontracting clauses[3] and by the use of economic coercion to

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[1] *Los Angeles Bldg. & Construction Trades Council (Donald Schriver, Inc.)*, 239 N.L.R.B. 264 (1978), *enforced, Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2058 (1981); *Colorado Bldg. & Construction Trades Council (Utilities Service Engineering)*, 239 N.L.R.B. 253 (1978).

[2] Three of the employers involved in these cases and the closely related cases appealed to the D.C. Circuit Court of Appeals in which petitions for certiorari were denied (*Los Angeles Building & Construction Trades Council, supra* note 1) are residential builders or subcontractors to residential builders.

[3] The collective bargaining agreements in issue provide that the employer party may not subcontract work "to be done at the site of construction, alteration, painting or repair of a building, structure or other work" except to a firm having a labor agreement with the union party. *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)*, 239 N.L.R.B. 274 (1978), *aff'd Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1307-08 (9th Cir. 1981) (rehearing *en banc*). Such clauses, which purport to limit subcontracting to employers who are signatories to union contracts, are termed

obtain such clauses. As this Court noted in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 623-24 (1975), economic efficiency is not related to whether a subcontractor pays wages and fringe benefits equivalent to those established by an agreement negotiated with a building trades union. Union signatory subcontracting clauses, however, restrict an employer's freedom to choose with whom he does business without regard to whether the superior economic efficiency of subcontractors thereby excluded from the market is derived from paying less than union scale to their employees. These clauses create a privileged class of employers having union labor agreements who are insulated from competition from employers without such agreements. Broadening the permissable scope of such clauses beyond the original intent of Section 8(e),[4] as the Court of Appeals has done in these cases, therefore threatens

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"union signatory clauses." If entered into by construction industry employers they violate § 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e), unless they fall within the protection of the so-called "construction industry proviso" to § 8(e). *Los Angeles Bldg. & Construction Trades Council, supra* note 1, at 1304-06.

[4] Section 8(e), 29 U.S.C. § 158(e), was added as an amendment to the National Labor Relations Act as part of the Labor-Management Reporting and Disclosure Act of 1959 (also known as the Landrum-Griffin Act), 73 Stat. 519. Section 8(e) was intended to "plug technical loopholes" in the secondary boycott prohibitions of § 8(b)(4), 29 U.S.C. § 158(b)(4), by making unlawful agreements between labor and management to refuse to deal with other employers (so-called "hot cargo" agreements) in order to affect their labor policies. *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 628 (1975); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 634 (1967). Provisos exempting agreements in the construction and the garment industries were added prior to enactment by the Joint Conference Committee. H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959), 1959 *U.S. Code Cong. & Admin. News*, p. 2511. Whether the construction industry proviso shelters such agreements when they are not confined to particular jobsites at which union workers are engaged is the primary issue in these cases.

to increase housing costs and decrease efficiency in the production of housing.

Economic efficiency is of critical importance to the housing industry at this time and will be no less so in the future. The explosive cost of credit for both builders and purchasers, and the spiraling cost of the construction of all types of residences, make economic efficiency in the housing market a key national goal, if not a necessity.

The Court of Appeals below also determined that resort to economic coercion to obtain union-signatory subcontracting agreements is lawful. This ruling licenses unions to coerce union and non-union home builders (if they employ members of the trade claimed by the union) to agree to refrain from subcontracting to firms who do not bargain with the coercing union. Most home builders (and their subcontractors) are powerless to resist this sort of coercion, as are most other construction contractors. Accordingly, they may be foreclosed from selecting subcontractors who are more efficient, but who do not have the appropriate labor agreements, even if the efficiencies of those subcontractors are not derived from any substandard wages and fringe benefits of their workers. Efficient non-union subcontractors also may be foreclosed from bidding on their work. Economic coercion of this type forces a contractor who otherwise would not participate in a lawful boycott of a subcontractor to act contrary to his judgment, and yet may confer no benefit on his or the subcontractor's employees. As argued within, and by Petitioners, such distortion of the marketplace was not authorized by Congress in Section 8(e).

NAHB regularly represents the interests of its members in matters affecting the housing industry, including labor relations, before the courts, the Congress and state legislatures, and independent regulatory agencies of the federal government. As part of this effort, NAHB recently appeared in this Court as an *amicus* in *San Diego Gas & Electric Co. v. City of San Diego*, 101 S. Ct. 1287

(1981), *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *City of Eastlake v. Forest City*, 426 U.S. 668 (1976).

This *amicus* brief is filed with consent of all parties as provided by Supreme Court Rule 36.2.

STATEMENT OF THE CASE

In the interest of brevity, *amicus* hereby adopts by reference the statements of the case contained in the Petitioners' briefs on the merits.

SUMMARY OF THE ARGUMENT

The Court of Appeals erroneously determined that clauses in labor agreements which prohibit construction contractors from subletting any work except to other union signatory employers are exempted from the "hot cargo" prohibition of Section 8(e) of the National Labor Relations Act by the construction industry proviso, and also erroneously determined that it is lawful for a union to strike or picket to compel a construction contractor to agree to such subcontracting clauses.

The Court of Appeals conclusion that subcontracting agreements are protected by the construction industry proviso is based principally upon the mistaken belief that the construction industry proviso serves not one but two primary purposes: prevention of "shoulder-to-shoulder" friction between union and non-union workers at the jobsite, and protection of union workers' contract standards from dilution through subcontracting. The first policy has been often noted in connection with Section 8(e), but the legislative history of Section 8(e) reveals no intention to protect contract standards at the expense of controlling the "top-down" organizing effects of such agreements. The policy of protecting contract standards is a belated addition to the interpretation of Section 8(e) proffered by the NLRB and the respondent unions below. As the Court of Appeals itself concedes,

however, and as this Court found in *Connell*, the overriding intent of Congress in 1959 was to restrict the evils of "top-down" organizing.

Amicus submits that the Court of Appeals decision failed to strike the proper balance among the competing policies, thereby permitting construction unions to "indiscriminately exclude nonunion subcontractors from a portion of the market, even if their competitive advantages are not derived from substandard wages and working conditions but rather from more efficient operating methods." *Connell*, 421 U.S. at 624. Proper interpretation of the construction industry proviso requires recognition of the need to balance the interest of workers in avoiding jobsite friction between union and non-union labor with the national labor policy of preventing wholesale "top-down" organizing. The first panel opinion of the Ninth Circuit,[5] and the dissenting opinion of Judge Sneed below, which state that subcontracting clauses are only protected by Section 8(e) when they are expressly limited to jobsites at which friction between union and nonunion workers can be expected, strike the appropriate balance.

The Court of Appeals conclusion that unions may strike or picket to obtain secondary subcontracting clauses is also erroneous. The legislative history and this Court's decision in *Sand Door*[6] show that the 1959 Landrum-Griffin Act preserved only *voluntary* subcontracting agreements. In reaching its decision, the Court of Appeals relied only on its reading of the language of the amended act, and on certain Court of Appeals decisions subsequent to the 1959 amendments which overruled the National Labor Relations Board's repeated determination

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[5] *Pacific Northwest Chapter, ABC v. NLRB*, 609 F.2d 1341, 1345-1350 (9th Cir. 1979) (panel opinion), *vacated on rehearing*, 654 F.2d 1301 (9th Cir. 1981) (*en banc*).

[6] *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB* (*Sand Door*), 357 U.S. 93 (1958).

that economic coercion to obtain a subcontracting clause is unlawful.[7] Section 8(e) should not be thus construed, however, as licensing construction unions to obtain *through coercion in bargaining* what they cannot obtain through coercion in a direct secondary boycott. Congress intended for the Landrum-Griffin Act to preserve uncoerced freedom of choice for construction employers, union and non-union alike, in determining whether to participate in boycotts.

ARGUMENT

I. THE CONSTRUCTION INDUSTRY PROVISO SHELTERS ONLY SUBCONTRACTING RESTRICTIONS AIMED AT REDUCING JOBSITE FRICTION.

The Petitioners contend that lawful union signatory subcontracting agreements must not only be made within a collective bargaining relationship, but also may only operate on jobsites where there is the possibility of friction arising between union and non-union employees. Their argument is based principally upon the view of the construction industry proviso articulated by this Court in *Connell*, and we agree with their position.

Union signatory subcontracting clauses dramatically restrict the home builder's or general contractor's choice

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[7] After the 1959 amendments adding § 8(e), the NLRB ruled unanimously that striking or picketing to obtain a subcontracting clause was unlawful under §§ 8(b)(4)(A) and (B). *Construction, Prod. & Maintenance Laborers Union, Local 393 (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650 (1962), *rev'd*, 323 F.2d 422 (9th Cir. 1963). However, this view was rejected by several other Courts of Appeal, as well as the Ninth Circuit. *Essex County & Vicinity District Council of Carpenters & Millwrights v. NLRB*, 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964); *Bldg. & Construction Trades Council of San Bernardino v. NLRB*, 328 F.2d 540 (D.C. Cir. 1964). The NLRB subsequently acquiesced to these views in *Northeastern Indiana Bldg. & Construction Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *rev'd on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

of subcontractors, and also completely foreclose non-union subcontractor's from bidding on their work. The economic vice of union signatory subcontracting agreements is that they

> "indiscriminately exclud[e] non-union subcontractors from a portion of the market, even if their competitive advantages [are] not derived from sub-standard wages and working conditions but rather from more efficient operating methods."

Connell Construction Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 623 (1975). The subcontracting clauses at issue in these cases have the effect of creating a protected market for the services of a select few unionized subcontractors. The necessary and intended effect of these clauses is to severely restrict the options of construction employers in selecting their subcontractors.

The NLRB and the respondent unions argue that such union signatory subcontracting clauses should be permitted in order to protect contract standards for unionized construction workers.[8] However, as this Court em-

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[8] The Ninth Circuit and NLRB also argue that union signatory clauses are part of a "pattern of collective bargaining" in the industry intended to be preserved by the proviso. This argument is built on insubstantial ground. As the majority opinion for the Ninth Circuit concedes, studies relied upon by the NLRB to show the "pattern of collective bargaining" in the industry are at best equivocal. The most glaring defect of such studies is that, as noted by the NLRB General Counsel, they also indicate that subcontracting clauses of the kind which all parties to this action agree are prohibited by this Court's ruling in *Connell* were as much a part of the "pattern of collective bargaining" in the industry in 1959 as any other. 1974 Labor Relations Yearbook (BNA 1975) 298, 307. These studies thus hardly provide a secure foundation for the conclusion that construction industry subcontracting clauses of the kind in question here are to be preserved by the proviso. In addition, there is simply no reference in the legislative history to the specific kinds of clauses which Congress intended to preserve. The General Counsel, who conducted an exhaustive survey of this topic, deemed the reports too inconclusive and equivocal to be relied upon. In short, there is little or no reliable basis for the conclusion that

phatically noted in *Connell*, "curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers." 421 U.S. at 623. In these cases, this Court is again presented with the difficult question of how to strike the proper balance between these competing interests.

In *Connell*, this Court was concerned that the union signatory subcontracting clause forced upon Connell Construction Company would give the union "power to control access to the market" by subcontractors. 421 U.S. at 624. The Court noted that, by prohibiting subcontracting to any firm that did not have a contract with the union, the union achieved

> "complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse affects upon the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions."

421 U.S. at 624. The economic consequences of making substantial numbers of subcontractors "ineligible to compete for a portion of the available work" (*Connell*, 421 U.S. at 625) does not require elaboration. Such "sheltering" of union subcontractors "from outside competition in that portion of the market covered by subcontracting agreements" has the effect of "eliminating competition on all subjects covered by the multi-employer agreement, even on subjects unrelated to wages, hours, and working conditions." *Connell*, 421 U.S. at 624. This is an effect which the national housing market and con-

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Congress specifically intended in 1959 to preserve the types of subcontracting clauses at issue here. We submit that the only fair reading of the evidence on this subject is that the actions of Congress cannot be read as supporting any specific sort of subcontracting restriction.

struction industry simply cannot bear in the unlimited form sanctioned by the Court of Appeals.

This Court has repeatedly stressed the importance of Sections 8(e) and 8(b)(4) to the national policy of preventing adverse economic consequences of hot cargo agreements and boycotts. This Court summed up, we believe, the outermost bounds of permissable union conduct in this area in *Connell*:

> "Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members."

421 U.S. at 622. This "Congressional policy favoring free competition in business markets" (*Connell*, 421 U.S. at 622) is as indispensable to the proper interpretation of the construction industry proviso as it is to the interpretation of labor's exemption from the antitrust laws which was the principal concern of *Connell*.

The premise that the construction industry proviso must be interpreted so as to provide *maximum protection* for the contract standards of unionized employees of general contractors was adopted by the NLRB and the Ninth Circuit for the first time in the course of this litigation. The Board previously interpreted Section 8(e) as directed at the problems of jobsite friction between union and non-union employees. *International Union of Operating Engineers, Local 542 (York County Bridge, Inc.)* 216 N.L.R.B. 408, 409 (1975), *enforced*, 532 F.2d 902 (3d Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977). Prior to its consideration of these cases, the Ninth Circuit had concluded that the dominant purpose of the construction industry proviso was to permit agreements aimed at eliminating jobsite friction between union and non-union employees. *ACCO Construction Equipment, Inc. v. NLRB*, 511 F.2d 848, 851 (9th Cir. 1975).

There is no legislative support for the view that the proviso must be interpreted in light of a national policy of

affording maximum protection for contract standards of union construction workers.[9] The Court of Appeals majority strains to lay a foundation for this policy by arguing that the 1959 amendments were intended to accommodate the special features of construction industry bargaining (the closed shop, pre-hire agreements and subcontracting restrictions) within the inconsistent structure of the 1947 Taft-Hartley Act. *Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1309-10 (9th Cir. 1981). However, the Court of Appeals does not identify any statements in the legislative history which support this view.[10] Instead, the court reaches back to 1954, *five years* prior to the enactment of Landrum-Griffin to cite statements by then President Eisenhower calling for generalized reform of Taft-Hartley to permit the closed shop, pre-hire agreements, and secondary boycotts of the type outlawed by this Court in *Denver Building Trades*.[11] 654 F.2d at 1310. These remarks are, of course, irrelevant to the question of voluntary hot cargo agreements, the topic of Section 8(e).

The overriding policy of the 1959 Act was clearly identified by this Court in *Connell*:

> "One of the major aims of the 1959 Act was to limit "top down" organizing campaigns, in which unions

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[9] The legislative history is sprinkled, however, with references to the importance of controlling the damaging economic effects of both "hot cargo" agreements and coercive boycotts. H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. (1959), 1959 *U.S. Code Cong. & Admin. News*, pp. 1136, 1149, 2443-44; Declaration of Findings, Purposes and Policy, Labor-Management Reporting and Disclosure Act of 1959, Pub.L. No. 86-257, § 2(c).

[10] The District of Columbia Court of Appeals in *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 877 (D.C. Cir. 1980), *cert. denied* 101 S.Ct 2058 (1981) adopts a similar view that the proviso protects "continuity of work and benefits for employees" merely based upon the assertion that this policy is "consistent" with the intent of Congress.

[11] *NLRB v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675 (1951).

> used economic weapons to force recognition from an employer regardless of the wishes of his employees."

421 U.S. at 632. After an exhaustive examination of the legislative history, the Court concluded that the construction industry proviso was adopted as a "partial substitute" for legislation intended to permit secondary boycotts against employers engaged in work at a common construction site. In *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 638-639 (1967), this Court also interpreted the construction industry proviso as directed primarily to the problem of jobsite friction between union and non-union workers—the overriding concern in *Denver Building Trades* which certain unsuccessful bills proffered as amendments to the 1959 Act addressed. This, together with the *Connell* Court's repeated references to the fact that the subcontracting agreement sought by the union was not "limited to a particular jobsite" suggests that the construction industry proviso should be narrowly interpreted as sanctioning only those subcontracting clauses which are addressed to the problems of friction between union and non-union employees on particular jobsites where union employees of the general contractor are present. This is the interpretation adopted by the original panel opinion of the Ninth Circuit below. It is the only interpretation which accounts for the overriding economic considerations previously identified by this Court as a major policy of the 1959 Amendments.[12]

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[12] In any event, the use of union signatory subcontracting clauses is not necessary to protect contract standards. So-called "union standards" clauses, which forbid employers to subcontract except to firms which meet or exceed union wages and fringe benefits but allow non-union firms meeting those standards to bid on the work, accomplish this same protective result without creating a privileged class of subcontractors. In addition, union standards clauses do not undermine the policies of § 7 of the National Labor Relations Act, 29 U.S.C. § 157, by requiring subcontractors' employees to join and be represented by the union.

Moreover, even accepting that protecting building trade unions' contract standards is a policy to be considered in interpreting and applying Section 8(e), the question is not what interpretation of the construction industry proviso best serves this single interest, as the NLRB and the Ninth Circuit apparently assume, but rather how to balance this interest against the competing policies which this Court articulated in *Connell*.

In *Connell*, this Court identified the prevention and control of unlimited "top-down" organizing through secondary boycotts and hot cargo agreements as a primary, if not the primary, motivation behind the 1959 amendments. The legislative history unequivocally demonstrates that Congress' primary concern in the Landrum-Griffin Act was to complete the framework for legislative control of both voluntary boycott agreements and union coercion to achieve secondary boycotts. Accordingly, the construction industry proviso to Section 8(e) must be read narrowly. The Court of Appeals ruling ignores these policies underlying the act. The hidden, unspoken premise in the NLRB's and Court of Appeals arguments is that, having identified the policy, it must necessarily govern. We submit that the proper balance is to recognize, as the dissenters and the original panel below did, that subcontracting clauses must be fashioned so as to prohibit subcontracting except to union signatories *only* in situations where union workers may clash with non-union workers on particular jobsites. To do otherwise creates no balance whatsoever between the overriding policy of limiting "top-down" organization and the protection of contract standards.

The original panel correctly recognized the adverse economic consequences of permitting use of union signatory subcontracting clauses as unlimited "top down" organizing weapons.

> "We cannot extend the proviso's protection beyond the purpose for which the exemption was created

> without creating a shield of immunity for agreements which we believe Congress wished to prohibit . . . [A] subcontractor clause in a contract with a particular union which flatly forbids the use of subcontractors who have no contract with the signatory union on jobsites, regardless of whether workers of the signatory union will also be employed on those sites, goes well beyond the kind of arrangement which the proviso was created to protect."

Pacific Northwest Chapter, ABC v. NLRB, 609 F.2d 1341, 1350 (9th Cir. 1979), *vacated on rehearing*, 654 F.2d 1301 (9th Cir. 1981). Accordingly, they held that:

> "The construction industry proviso extends shelter only when a collective bargaining relationship exists, and even then only when the employees who are members of the signatory union are at work at sometime at the jobsite at which the employer wishes to engage a non-union subcontractor."

609 F.2d at 1347.

II. STRIKES AND PICKETING TO OBTAIN "HOT CARGO" AGREEMENTS FROM CONSTRUCTION CONTRACTORS VIOLATE SECTION 8(b)(4)

In the *Sand Door* decision, this Court recognized the strong federal policy of protecting the contruction employer's freedom to choose whether to refuse to deal with another in support of a labor dispute not his own.[13] Al-

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[13] *Local 1976, United Bhd. of Carpenters & Joiners v. NLRB (Sand Door)*, 357 U.S. 93, 105 (1958):

> "the freedom of choice for the employer contemplated by Section 8(b)(4)(A) [now §8(b)(4)(A) and (B)] is a freedom of choice at the time the question of whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—*must as a matter of federal policy be available to the secondary employer* notwithstanding any private agreement entered into between the parties." (emphasis supplied)

though this Court was addressing the issue of the legality of picketing to *enforce* such agreements in that case, the freedom of choice which is threatened in these cases is the same. The touchstone as to whether picketing to obtain hot cargo agreements was illegal under the old Section 8(b)(4)(A), and thereby dispositive of the same issue today under Sections 8(b)(4)(A) and (B), is "*whether the employer has in fact truly sanctioned and supported the boycott, and whether he has exercised the choice contemplated by the statute.*" [14] It is only by protection of the construction employer's right to choose with whom he will deal that competitive efficiencies unrelated to wages and working conditions can be accommodated in the construction market.

The Court of Appeals below concluded that at the same time Congress intended to prohibit building trades unions from using economic weapons to enforce hot cargo agreements, it intended to sanction the use of those weapons to force construction employers to enter into such agreements. Examination of the legislative history and this Court's decisions pre-dating the enactment of the Landrum-Griffin Act, however, leads to but one conclusion: that at the time the 1959 amendments were added to the National Labor Relations Act, construction unions were forbidden from using coercion to force employers to involuntarily agree to hot cargo agreements. In other words, by enactment of the construction industry proviso to Section 8(e), Congress granted labor organizations and employers in the construction industry only a limited exemption from the general prohibition against entering *voluntary* hot cargo agreements, and nothing more.

This Court has previously reviewed the legislative history and case authority preceding the enactment of the construction industry proviso. *Connell*, 421 U.S. at 628-630; *National Woodwork*, 386 U.S. at 638-39. The Court found it unnecessary then to decide whether a construc-

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[14] *Sand Door, supra* note 13, 375 U.S. at 107.

tion union could lawfully picket or strike to obtain a hot cargo agreement. *Connell*, 421 U.S. at 633 n.14. Now, this Court has the opportunity to clarify the permissible range of construction unions' coercive powers and to decide whether the construction employer's right to choose with whom he does business is entitled to protection from such economic pressures.[15]

A. The Landrum-Griffin Act Merely Preserved The Status Quo As To The Legality Of Coercion To Obtain Hot Cargo Agreements.

The Conference Committee on the Landrum-Griffin Act, the last legislative pronouncement before enactment, emphatically stated that the construction industry proviso was to leave unaffected the law developed under Section 8(b)(4).[16] Senator Barry Goldwater, one of the Senate

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[15] The respondent unions assert that review of this issue is foreclosed by § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e). The short answer to this contention is that the issue was briefed, argued and determined by the Court of Appeals and is therefore presented for review by this Court. Moreover, the Court has inherent power to determine even legal issues never raised or resolved in the proceedings below if the case compels or presents an appropriate opportunity for such a decision. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Carlson v. Green*, 446 U.S. 14 (1980); *Rogers v. United States*, 442 U.S. 35 (1975).

[16] The Conference Committee stated:

> "To the extent that such agreements are illegal today under Section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by Section 8(e). The proviso applies only Section 8(e) and therefore leaves unaffected the law developed under Section 8(b)(4). The *Denver Building Trades* case and the *Moore Drydock* cases would remain in full force and effect. The proviso is not intended to limit, change or modify the present state of the law with respect to picketing at the site of a construction project. Restrictions and limitations imposed upon such picketing under present law as interpreted, for example, in the U.S. Supreme Court decision in the *Denver Building Trades* case would remain in full force and effect. *It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with*

conferees (and whom the Court of Appeals characterized as "the man who may have been most responsible for" the Landrum-Griffin Act)[17] emphasized with equal clarity that the 1959 Amendments were not to be looked to in determining whether such picketing was lawful.[18] Senator John F. Kennedy, leader of the Senate conferees, expressed a similar understanding of the 1959 Act.[19] There-

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respect to the legality of a strike to obtain such a contract." (emphasis supplied)

H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959); 1959 *U.S. Code Cong. & Admin. News*, pp. 2511-12.

[17] *Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1323 n. 41 (9th Cir. 1981).

[18] Senator Goldwater stated:

"*The new provision is silent with respect to the lawfulness of coercion or restraint—economic or otherwise—by one party to compel the other party to enter into, or even to bargain about entering into such an agreement.* This question was one of those left unresolved by the Board and the courts under Taft-Hartley prior to this new legislation, but now specifically outlawed in all situations not falling within the exemption for the clothing and apparel and construction industries. *It is the intention of Congress that the new legislation leave it in the same unresolved status under the building construction industry exemption and that the Board and the courts decide the issue for the building construction industry as if these new amendments contained in Section 8(e) had not been enacted and in accordance with the previously applicable law.* In other words, it is the congressional intent that Section 8(b)(4), as amended, banning secondary boycotts, apply without qualification in the building construction industry and that the principles enunciated in the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93), the *Denver Building Trades* case (*NLRB v. Denver Building and Construction Trades Council, et al*, 341 U.S. 675), and the *Moore Drydock* case (*Moore Drydock Co.*, 81 N.L.R.B. 1108), remain fully applicable." (emphasis supplied)

II *Legislative History of The Labor-Management Reporting & Disclosure Act of 1959*, 1858.

[19] Senator Kennedy stated that:

"Since the proviso does not relate to Section 8(b)(4), . . . It is not intended to change the law with respect to judicial en-

fore, if unions were prohibited from using economic weapons to force employers to enter into such agreements under the unamended version of Section 8(b)(4), then they continue to be prohibited from doing so under the amended version, regardless of the language contained in Section 8(e) and 8(b)(4). This point is crucial because the Court of Appeals, which held such picketing to be lawful, based its decision principally upon the language of Section 8(e) and the amended, new Section 8(b)(4)(A).[20]

The Court of Appeals ruling simply ignores the above referenced legislative history which clearly indicates that it is not the 1959 act, but the Taft-Hartley Act which the courts must interpret to define the scope of permissible striking and picketing under Section 8(b)(4) and Section 8(e). Thus, the instant cases were incorrectly decided on the basis of a negative implication arising from a rule of construction, a view which is almost convincing if one examines merely the amended statutory language in isolation from the legislative materials.[21]

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forcement of these contracts, or with respect to the legality of a strike to obtain such a contract."

II *Legislative History of The Labor-Management Reporting & Disclosure Act of 1959*, 1433.

[20] *Pacific Northwest Chapter, ABC v. NLRB*, 654 F.2d 1301, 1323 (9th Cir. 1981). *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 869 n. 15 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 2058 (1981), and other Courts of Appeal previously considering this issue reached the same conclusion, but also based their decision on the same faulty analysis. *Construction, Prod. & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County & Vicinity District Council of Carpenters & Millwrights*, 322 F.2d 636 (3d Cir. 1964). The NLRB has acquiesced in these erroneous views. *Northeastern Indiana Bldg. & Construction Trades Council (Centlivre Village Apartments)*, 148 N.L.R.B. 854 (1964), *remanded on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

[21] The argument is that, since the actual language of the current § 8(b)(4)(A) prohibits coercion of any person "to enter into any

Once the Court of Appeals reasoning on this primary point has been shown to be fatally flawed, the remaining arguments in support of its position are easily dispelled.

The Court of Appeals had previously considered this issue and held that the Conference Committee's elimination of the phrase "or agree to cease" from Section 8(b)(4)(B) was additional support for this position.[22] Since the Conference Committee deleted those words from Section 8(b)(4)(B) because the restrictions imposed by such language were already included in other provisions prohibiting entering into hot cargo agreements and therefore believed to be duplicative, it is argued, Section 8(b)(4)(B) now only prohibits the enforcement of such agreements. This analysis actually proves the opposite conclusion. If Congress believed the placement of such language in Section 8(b)(4)(B) was simply duplicative of another section of the statute (primarily 8(b)(4)(A)), then Congress did not believe that it eliminated any legal right by dropping the language from Section 8(b)(4)(B). In other words, Congress perceived this language as *adding* nothing substantive to the Act. If such language had been included in Section 8(b)(4)(B), the picketing in the instant cases (and any other picketing which was directed at forcing an employer to enter a lawful hot cargo agreement) would clearly be illegal. Therefore, Sections 8(b)(4)(A) and (B) still prohibit coercion to obtain hot cargo agreements.

Moreover, Congress would not have used the language "an agreement" in the construction industry proviso un-

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agreement which is prohibited by [§ 8(e)]", the "negative implication" of this provision is that picketing or striking to induce entry into an agreement protected by the proviso to § 8(e) is lawful. This ignores both Goldwater's and Kennedy's statements, and ignores the function of § 8(b)(4)(B), formerly § 8(b)(4)(A), under the Taft-Hartley Act.

[22] *Construction, Prod. & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422, 426-27 (9th Cir. 1963).

less it actually meant a "voluntary agreement".[23] The legislative history of Section 8(f), 29 U.S.C § 158(f) is relevant here. Section 8(f), like Section 8(e), also uses only the term "an agreement" wherein it is specifically referring to a voluntary, uncoerced agreement.[24] Both of these provisions were adopted in 1959 as part of the same Act. Both are directed at limiting labor's use of economic weapons to force "top-down" organizing upon employers and their employees. Accordingly, Section 8(e) must be read, like Section 8(f), as only referring to voluntary subcontracting agreements.

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[23] In *Essex County & Vicinity District Council of Carpenters & Millwrights v. NLRB*, 332 F.2d 636, 641 (3d Cir. 1964), however, the Third Circuit Court of Appeals argued that since Congress could have used the more restrictive term "voluntary agreement" in the text of the construction industry proviso, it surely intended not to so limit the scope of the proviso by choosing instead the words "an agreement." This analysis is backward for the reasons stated in the text.

[24] Congress was careful to make its intention clear that the pre-hire agreements newly authorized under accompanying § 8(f) were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle. Representative Barden, an important House floor leader on the Bill and a conferee, explained the voluntary nature of the pre-hire agreement exception by quoting this explanation of § 8(f) from Senator Kennedy:

> "Mr. Kennedy: I shall answer the Senator from Florida as follows—It is my intention, by so answering, to establish the legislative history on this question: It was not the intension of the Committee to require by Section 604(a) the making of pre-hire agreements, but, rather, to permit them; nor was it the intention of the Committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a pre-hire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary pre-hire agreements."

II *Legislative History of the Labor-Management Reporting & Disclosure Act of 1959*, 1715. The House Conference Report similarly stressed that "[n]othing in such provision is intended . . . to authorize the use of force, coercion, strikes, or picketing to

B. Prior To The Enactment Of The Landrum-Griffin Act, Coercion To Obtain "Hot Cargo" Agreements Was Prohibited.

This Court acknowledged in *Connell* the essential role of the 1959 Amendments in preventing secondary boycotts:

> "Section 8(e) was part of a legislative program designed to plug technical loopholes in Section 8(b)(4)'s general prohibition of secondary activities. In Section 8(e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by Section 8(b)(4)."

421 U.S. at 628. As noted by this Court in *NLRB v. Denver Building & Construction Trades Council (Denver Building Trades)*, 341 U.S. 675, 686 (1951), Senator Taft, a sponsor of the Taft-Hartley bill in the Senate and Chairman of the Senate Committee on Labor and Public Welfare in charge of the bill, declared that his

> "Committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice. 93 Cong. Rec. 4198."

The Court concluded in *Denver Building Trades* that Section 8(b)(4) "restricts a labor organization and its agents in the use of economic pressure where an object of it is to force an employer or other person to boycott someone else." 341 U.S. at 687. The Court of Appeals decision below requires one to accept the contrary premise that Congress intended to permit unions to use economic weapons to force employers to enter into agreements, the object of which Congress also condemned and declared an unfair labor practice. If we apply the test

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compel any person to enter into such pre-hire agreements." H.R. Rep. No. 1147, 86th Cong., 1st Sess. 42 (1959), 1959 *U.S. Code Cong. & Admin. News*, pp. 2318, 2514. See *Connell*, 434 U.S. at 348.

set forth by this Court in *Denver Building Trades*, however, picketing to obtain union signatory subcontracting clauses is "economic pressure where an object of it is to force an employer . . . to boycott someone else" and therefore within the scope of the prohibition contained in Section 8(b)(4)(A) prior to the enactment of the Landrum-Griffin Act.

In *Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB* (*Sand Door*), 357 U.S. 93 (1958), this Court distinguished between hot cargo agreements entered into *voluntarily* [held to be beyond the scope of Section 8(b)(4)] and those entered into in response to economic coercion.[25] To say, as the Court of Appeals has said in these cases below, that a union may use economic weapons to accomplish by way of contract what it is clearly prohibited from accomplishing when the subcon-

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[25] As the Court stated:

> "Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of "secondary boycotts" and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in Section 8(b)(4)(A). The Section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. *It forbids a union to induce employees to strike against . . . their employer when an object is to force him . . . to cease doing business with some third party.* Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person . . . *a boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute. Likewise, a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specific prohibited means of coercion through inducement of employees.*"

357 U.S. at 98-99 (emphasis added).

tractors are working at the construction site, completely contradicts this Court's perception in *Sand Door* that only "voluntary" agreements were excluded from the prohibitions of Section 8(b)(4).

The specific determination of this Court in *Sand Door* is that strikes or picketing in order to enforce otherwise lawful agreements restricting subcontracting are illegal. 357 U.S. at 106. In order to reach this conclusion, the Court reasoned that Congress contemplated "freedom of choice" for the employer at the time when the question of whether to participate in the boycott of the primary employer targeted by the union arises. 375 U.S. at 105. The Court noted that the employer's "intelligent exercise of such a choice" was at its peak in a concrete situation, and was less capable of being exercised during collective bargaining when an agreement is "drawn up covering a multitude of subjects, often in a general and abstract manner." 357 U.S. at 106. Accordingly, the "possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned" supported the conclusion that strikes and picketing to enforce such clauses could not be tolerated consistently with the voluntary choice Congress intended to allow employers concerning whether to support union-inspired boycotts. 375 U.S. at 106. This reasoning in support of the Court's holding that strikes and picketing to enforce hot cargo agreements are prohibited applies with even greater force in the context of strikes or picketing to obtain an employer's agreement to such boycotts through restrictive subcontracting clauses. If it is contrary to the intention of Congress that an employer be denied a voluntary choice whether to support such boycotts, it is surely even more objectionable to permit coercion in the exercise of such choice during the time when collective bargaining agreements are drawn covering "a multitude of subjects" in a "general and abstract manner" rather than in the impact of a "concrete situation." 357 U.S. at 105-06.

What emerges from this Court's opinion in *Sand Door* is the basic premise that a construction employer's freedom to choose with whom he deals is an important federal policy. That freedom is no less important when exercised in the context of collective bargaining with a union than when the employer is engaged in work on the construction site.[26] Accordingly, this Court ruled in *Sand Door* that a union could not picket to enforce such an agreement even if the employer entered the agreement voluntarily.

This Court also should now rule that the construction employer's freedom to choose with whom he does business is entitled to protection from the effects of economic coercion at the time of collective bargaining as well. If a construction employer is to enjoy the freedom of choice to decide whether he will voluntarily support a boycott "for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interest with those of his employees and their union," (*Sand Door*, 357 U.S. at 98-99) he must be able to arrive at his decision in an atmosphere free from the powerful pressures associated with union coercion. Of course, unions are still free to approach a construction employer to persuade him to participate in a lawful boycott. Pressuring the employer by

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[26] The distinction drawn by the Ninth Circuit in *Construction, Prod. & Maintenance Laborers Union, Local 383 v. NLRB*, 323 F.2d 422, 426 n.2 (9th Cir. 1963) between an employer's choice to refuse to deal with another arising in a concrete situation as opposed to when it arises at the time of collective bargaining (a distinction which this Court first discussed in *Sand Door*) is rendered meaningless where a union uses economic coercion to achieve its secondary objective in bargaining. The nature of the construction industry is characterized by a series of business relationships between general contractors and subcontractors that are established when these employers work together periodically from job to job. To say that such business relationships are unworthy of protection from union coercion in between jobs is to render this Court's discussion in *Sand Door* meaningless.

strikes or picketing, however, undermines the contractor's ability to weigh such participation against the benefits and opportunities derived from dealing with a wide variety and large number of subcontractors.

This Court's decisions following the enactment of the Landrum-Griffith Act are in harmony with the position that unions should be restrained from using economic coercion to obtain subcontracting clauses. Its most recent discussion of Section 8(e) appears in *NLRB v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers (Higdon Construction Co.)*, 434 U.S. 335 (1978). In *Higdon*, this Court drew a comparison between Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f), which permits so-called pre-hire agreements in the construction industry, and the proviso to Section 8(e), to illustrate the point that a prohibition against picketing does not render trade unions' statutory right to enter into voluntary agreements meaningless. *Higdon*, 434 U.S. at 349 n. 11. Our position that unions will remain free to approach construction employers to persuade them to voluntarily cease doing business with certain subcontractors is in accord with the Court's view as expressed in *Higdon*.

Similarly, in *National Woodwork*, this Court noted that the situation in which a union used economic weapons as a sword to acquire new jobs or to monopolize a market must be distinguished from the situation in which such weapons are used as a shield to preserve jobs. 386 U.S. at 630. The unions in the instant cases are using their right to picket as a sword to promote secondary objectives elsewhere, and as such, violate the spirit and the letter of the unamended Section 8(b)(4) of the Taft-Hartley Act.

> "In effect Congress, in enacting § 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., supra*, and barred as

> a secondary boycott union activity directed against a neutral employer, including the immediate employer, when in fact the activity directed against him was carried on for its effect elsewhere."

National Woodwork, 386 U.S. at 632. Lastly, as previously discussed herein, in *Connell* the Court recognized the undesirable consequences of "top down" organizing campaigns. It is the position of *amicus* that construction unions will have finally found a lawful means by which to accomplish the identical secondary objectives they sought to accomplish in *Connell* if they are permitted to engage in unlimited picketing to pressure construction employers to cease doing business with subcontractors.

In summary, the voluntary participation exception to the original Section 8(b)(4)(A) identified by this Court in *Sand Door* supports the finding that union picketing to force employers to enter such agreements was illegal at the time of the enactment of the Landrum-Griffin Act.

Moreover, Congress has again and again demonstrated that the only secondary boycotts and "top-down" organizing that it will tolerate are of a voluntary nature, free from the extraordinary pressures associated with the use of picketing and strikes. Not surprisingly, this was the position of the NLRB for a number of years following the enactment of the Landrum-Griffin Act,[27] until the Board finally acquiesced after repeatedly being overturned by the Courts of Appeal which erroneously con-

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[27] In a unanimous five-member decision in *Construction, Prod. & Maintenance Laborers Union, Local 383 (Colson & Stevens Construction Co.)*, 137 N.L.R.B. 1650, 1652 n. 7 (1962), *rev'd*, 323 F.2d 422 (9th Cir. 1963), the NLRB convincingly argued:

> "This reading, we believe, gives hospitable scope to the competing interests which Congress here sought to balance. To construe the statute as condemning coercive enforcement of agreements of the type here involved, but condoning coercion as a means of obtaining such agreements, would in our view be to pay observance to slavish literalism and to frustrate the congressional objective . . ."

cluded that such picketing was sanctioned by the Landrum-Griffin Act.

CONCLUSION

For the reasons advanced above, and for the reasons advanced by the Petitioners, this Court should rule that the proviso to Section 8(e) of the National Labor Relations Act only protects subcontracting clauses which are limited in application to jobsites at which union employees of the signatory contractor may encounter non-union workers of their trade, and that economic coercion of the type prohibited by Section 8(b)(4) of the Act may not be used to obtain an employer's participation in a hot cargo agreement.

Respectfully submitted,

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